

General Comments on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Preface

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) is the first international legally binding human rights instrument to recognize the intersection between women's human rights and HIV. In Article 14 (1) (d) and (e), the Maputo Protocol lays down women's right to self-protection and to be protected from HIV infection, as well as their right to be informed of their HIV status and the HIV status of their partners in accordance with international standards and practices in force. As such, the Maputo Protocol is therefore, in practice, an important tool towards the alleviation of the disproportionate effect of the HIV pandemic on the lives of women in Africa.

Even though considered as a landmark, the provisions of the Maputo Protocol on HIV are not very explicit on the measures to be taken by States Parties to ensure the full implementation of women's rights to sexual and reproductive health.

However, in order for States Parties to effectively implement the provisions of Article 14 (1) (d) and (e), with a view to giving full effect to the rights enshrined, it is important that the nature and scope of their obligations, as well as the normative content of these provisions, are clearly understood.

In order to meet this objective, the African Commission on Human and Peoples' Rights (the Commission) adopted these General Comments on Article 14 (1) (d) and (e) at its 52nd Ordinary Session held from 9 to 22 October 2012 in Yamoussoukro, Côte d'Ivoire.

The General Comments respond to a need to articulate the specific measures to be taken by States Parties in order to fulfill their obligations by providing specific

interpretative guidance on the scope of Article 14 (1) (d) and (e). They also provide a set of international standards and best practices towards an effective implementation of the provisions of Article 14 (1) (d) and (e). In the absence of this guidance, there is a risk not only of non-compliance of the practices of States Parties with the relevant international standards, but also of violations of the human rights of women, through inaction and ignorance. The General Comments are to be used by States in preparing and submitting their periodic reports to the Commission.

Thanks to the fruitful collaboration between the mechanism of the Special Rapporteur on the Rights of Women in Africa and the Centre for Human Rights of the University of Pretoria, the Commission has, for the very first time, adopted General Comments on the interpretation of a provision of the Maputo Protocol. It is envisioned that they may serve as a model for expanding the interpretation of other provisions of human rights instruments of the African Union.

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Introduction

1. General Comments are used by human rights treaty bodies to interpret the provisions of relevant international legal instruments, with a view to assisting States to fulfil their obligations under such instruments. The competence of the African Commission on Human and Peoples' Rights (the African Commission) to adopt General Comments is derived from Article 45 (1) (b) of the African Charter on Human and Peoples' Rights (the African Charter), which authorises the African Commission to "formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights". As a complementary legal instrument to the African Charter, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Protocol) by necessary implications falls within the Commission's interpretative scope.
2. The Protocol was adopted by the African Union in 2003, and entered into force in 2005. It complements the African Charter by expanding the substantive protection of women's rights in Africa, including by explicitly providing for their health and reproductive rights. Under the Protocol, the term 'women' includes girls.
3. According to available data, women in Sub-Saharan Africa are at a disproportionate risk of HIV infection.¹ Most recent figures indicate that women comprise 59% of people living with HIV in this region.² In Sub-Saharan Africa, young women aged 15 to 24 years are as much as eight times more likely than men to be living with HIV.³ Given the susceptibility of women to HIV and related rights abuses in Africa, the African Commission recognises that the societal context based on gender

¹ *UNAIDS Progress Report* 2011 p 19.

² As above, figures from 2010.

³ *UNAIDS Factsheet: Women, Girls and HIV* (2012).

inequalities, power imbalances and male dominance has to be addressed and transformed in order for women to meaningfully claim and enjoy freedom from violence, abuse, coercion and discrimination.

4. According to the African Commission there are multiple forms of discrimination based on various grounds such as: race, sex, sexuality, sexual orientation, age, pregnancy, marital status, HIV status, social and economic status, disability, harmful customary practices and/or religion. In addition, the African Commission recognises that these forms of discrimination, individually or collectively, prevent women from realising their right to self-protection and to be protected.
5. The African Commission recognises that women in Africa have the right to the highest attainable standard of health which includes sexual and reproductive health and rights. Amidst high prevalence and significant risk of HIV exposure and transmission, women are unable to fully enjoy these rights. Notably, the limitation of women's rights in the context of sexual and reproductive health increases the likelihood to HIV exposure and transmission. This is further compounded for women living with HIV whose access to these rights is severely limited or denied as a result of HIV-related discrimination, stigma, prejudices and harmful customary practices.
6. Addressing the issue of HIV for the first time in an international legally binding instrument, Article 14 (1) (d) and (e) of the Protocol specifically deals with HIV. While the African Commission welcomes the explicit mention of HIV, it notes that the provisions are framed in open-ended language and in broad terms, and that reference is made to international standards without stipulating their content. There is, therefore, a need to adopt these General Comments to guide States action in line with these provisions of the Protocol.

7. While these General Comments focus on Article 14 (1) (d) & (e), this article should not be read and understood in isolation from other provisions of the Protocol dealing with the intersecting aspects of women's human rights, such as gender inequality, gender-based violence, harmful customary practices, and access to socio-economic rights.
8. The African Commission welcomes the commitments made by African governments recognizing the need for enhanced efforts to promote and protect women's sexual and reproductive health rights such as the 2001 Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases (Abuja Declaration), the 2006 Continental Policy Framework on Sexual and Reproductive Health and Rights, and the Maputo Plan of Action for the Operationalisation of the Continental Policy Framework for Sexual and Reproductive Health and Rights (Maputo Plan of Action) adopted in 2006.
9. Further, while Article 14 (1) (d) and (e) in focus refers to sexually transmitted infections, it must be noted that the focus on HIV in this document is deliberate in light of the disproportionate effect that HIV has on women's health in Africa. The aspects elaborated herein are also applicable to other sexually transmitted diseases.

Normative content

Article 14 (1) (d) the right to self-protection and the right to be protected from HIV and sexually transmitted infections

10. Although the Women's Rights Protocol distinguishes between the right to self-protection and the right to be protected from HIV in Article 14 (1) (d), this provision is interpreted to refer to States' overall obligation to

create an enabling, supportive, legal and social environment that empowers women to be in a position to fully and freely realise their right to self-protection and to be protected.

11. The right to self-protection and to be protected includes women's rights to access information, education and sexual and reproductive health services. The right to self-protection and the right to be protected are also intrinsically linked to other women's rights including the right to equality and non-discrimination, life, dignity, health, self-determination, privacy and the right to be free from all forms of violence. The violations of these rights will impact on women's ability to claim and realise her right to self-protection.

Article 14 (1) (e): The right to be informed on one's health status and the health status of one's partner

12. Article 14 (1) (e) defines the right to sexual and reproductive health to include the right to be informed on one's health status and the health status of one's partner. Health status refers to the complete state of a person's physical, mental and social well-being and not merely the absence of disease or infirmity.⁴
13. The right to be informed on one's health status includes the rights of women to access adequate, reliable, non-discriminatory and comprehensive information about their health. This also involves access to procedures, technologies and services for the determination of their health status. In the context of HIV, this right includes, but is not limited to: access to HIV testing, CD4 count, viral-load, TB and cervical cancer screening.

⁴ Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946 and entered into force on 7 April 1948.

14. Moreover, the right to be informed on one's health status must not only encompass knowing one's HIV status, but should also include pre-test counselling which enables women to make a decision based on informed consent before taking the test, as well as post-test counselling services on preventative measures or available treatment depending on the outcome of the HIV test.
15. The right to be informed on one's health status is applicable to all women irrespective of their marital status, including: young and adolescent women, older women, rural women, women who engage in sex work, women who use drugs, women living with HIV, migrant and refugee women, indigenous women, detained women, and women with physical and mental disabilities.
16. The right to be informed on the health status of one's partner is vital. It enables women to make informed decisions about their own health, especially where they may be exposed to a substantial risk of harm. Knowledge of a partner's health to help avoiding transmission of HIV and other sexually transmitted infections. Information on a partner's health status must be obtained with informed consent in line with international standards, without coercion, and should be primarily aimed at preventing harm to one's health.
17. Caution should be exercised in relation to the conditions and environments under which the right to be informed on the health status of one's partner may be exercised, in particular, where the revealing of a partner's health status may result in negative consequences such as harassment, abandonment and violence.

18. Information about the health status of one's partner may be obtained through notification by a third party (usually a healthcare worker) or disclosure (for instance, by the person themselves). Disclosure of one's health status is not always explicit. It may take various forms, including coded and implicit actions, by the person concerned. Coded or implicit actions may include disclosure that allows for the communication of a person's health status in a manner other than direct verbal dialogue. States must ensure that all forms of disclosure are recognised.
19. While disclosure should be encouraged, there should be no requirement to reveal one's HIV status or other information related to one's health status. In the context of HIV, healthcare workers should be authorised, without being obliged to, decide, depending on the nature of the case and according to ethical considerations, whether to inform a patient's sexual partners of his or her HIV positive status. Such a decision should be made in line with international standards, in accordance with the following principles:⁵
- i. The HIV-positive person in question has been thoroughly counselled;
 - ii. Counselling of the HIV-positive person has failed to achieve appropriate behavioural changes;
 - iii. The HIV-positive person has refused to notify, or consent to the notification of his/her partner(s);
 - iv. A real risk of HIV transmission to the partner(s) exists;
 - v. The HIV positive person is given reasonable advance notice;
 - vi. The identity of the person is not revealed to the partner (s), if practicable, otherwise identity is revealed;

⁵ International Guidelines on HIV and Human Rights para 20(g) and SADC model law on HIV in Southern Africa.

- vii. Follow-up is provided to ensure support to those involved, as necessary; and
- viii. The person providing HIV treatment, care, or counselling services has ensured that the person living with HIV is not at risk of physical violence resulting from the notification.

The revealing of a person's health status by a third party outside the ambit of the abovementioned guidelines is unlawful and may lead to penal sanctions.

General State Obligations: Respect, protect, promote and fulfil

- 20. Article 14 (1) (d) and (e), like any other human rights provision, imposes four sets of general obligations on States Parties namely to respect, protect, promote and fulfil.
- 21. **The obligation to respect** in relation to Article 14 (1) (d) & (e) requires States to refrain from interfering directly or indirectly with the rights to self-protection, to be protected, and the right to be informed on one's health status and the health status of one's partner.
- 22. **The obligation to protect** in relation to Article 14 (1) (d) and (e) requires States to take measures that prevent third parties from interfering with these rights. Special attention, in the implementation of this obligation, should be given to action by third parties that may impact on the right to sexual and reproductive health of all women, including those mentioned under paragraph 14 above.
- 23. **The obligation to promote** in relation to Article 14 (1) (d) and (e) requires States to create the legal, social and economic conditions that enable women to exercise their rights in relation to sexual and

reproductive health. This involves engaging in sensitisation activities, community mobilisation, training of healthcare workers, religious, traditional and political leaders on the importance of the right to protection and to be informed on one's status and that of one's partner.

24. **The obligation to fulfil** in relation to Article 14 (1) (d) and (e) requires States to adopt all the necessary measures, including allocation of adequate resources for the full realisation of the right to self-protection and to be protected and the right to be informed on one's health status and the health status of one's partner.

Specific State Obligations

25. The right to self-protection and to be protected against sexually transmitted infections, including HIV in Article 14 (1) (d) of the Protocol entails the following:

Access to information and education

26. The African Commission wishes to emphasise the importance of information and education on HIV prevention for women, in particular adolescents and youths. States Parties must guarantee information and education on sex, sexuality, HIV, sexual and reproductive rights. The content must be evidence-based, facts-based, rights-based, non-judgemental and understandable in content and language. This information and education should address all taboos and misconceptions relating to sexual and reproductive health issues, deconstruct men and women's roles in society, and challenge conventional notions of masculinity and femininity which perpetuate stereotypes harmful to women's health and well-being. This should be

pursued in line with the Maputo Plan of Action as well as articles 2 and 5 of the Protocol.

27. States Parties should provide educational programmes and access to information concerning HIV, including through sex education and public awareness campaigns, on available health services responsive to all women's realities in all contexts including those mentioned under paragraph 14 above. In addition, States Parties should ensure that educational institutions (primary and secondary schools), include HIV and human rights issues in their curricula. These should include HIV risk and transmission, prevention, testing, treatment, care and support and sexual and reproductive health and rights of women. States Parties must also ensure this education reaches women and girls in informal school systems including faith-based schools, as well as those out of school.
28. States Parties are obliged to provide appropriate pre-service and on-going in-service training for health providers and educators, including community based health care providers, on health and human rights.

Access to sexual and reproductive health services

29. Ensuring availability, accessibility, acceptability and quality sexual and reproductive health care services for women is crucial. Therefore, States Parties have the obligation to ensure comprehensive, integrated, rights-based, women-centred and youth friendly services that are free of coercion, discrimination and violence.
30. The African Commission is concerned about the limitations on and insufficient access to women's sexual and reproductive health services including access to prevention choices and methods, STI and HIV

prevention skills, and access to treatment. States Parties must guarantee available, accessible, affordable, comprehensive and quality women-centred HIV prevention methods, which include female condoms, microbicides, prevention of mother-to-child transmission, and post-exposure prophylaxis to all women not based on a discriminatory assessment of risk.

31. States Parties should also ensure that health workers are not allowed, on the basis of religion or conscience, to deny access to sexual and reproductive health services to women as highlighted in this document.
32. States Parties should integrate women-centred prevention methods with other services, including family planning, reproductive health, primary health care services, HIV and STI testing, antiretroviral treatment programmes and antenatal care. More equitable availability and access to prevention methods such as female condoms should be promoted and ensured by having adequate and sustainable planning, funding and distribution, together with the provision of new prevention technologies or methods. To this end, States Parties should ensure on-going funding for research.

Enabling legal and policy framework

33. The African Commission recognises that an enabling legal and policy framework is intrinsically linked to women's right to equality, non-discrimination and self-protection. States Parties have an obligation to create an enabling supportive, legal and social environment to allowing to control their sexual and reproductive choices and thus to strengthen control over HIV prevention and protection choices.

34. States Parties should ensure implementation of laws and policies through establishment of accountability mechanisms, the development of implementing guidelines, a monitoring and evaluation framework, and the provision of timely and effective redress mechanisms where women's sexual and reproductive health rights have been violated.
35. The African Commission wishes to stress that, as the duty of States Parties includes ensuring that women are in the position to claim and exercise their right to self-protection in a non-discriminatory framework as articulated in Article 2 of the Protocol, States Parties should enact laws and policies to ensure women's access to health and legal services. In particular, States Parties should enact anti-discrimination legislation to address HIV- and other sexually transmitted infections, related discrimination, stigma, prejudices and practices that perpetuate and heighten women's risk to HIV and related rights abuses. Where discriminatory laws and policies exist, States must take immediate action to remove these legal and policy barriers that hinder women's access to sexual and reproductive health services.
36. The right to be informed on one's health status and the health status of one's partner in Article 14 (1) (e) of the Protocol entails the following:

Access to information and education

37. In realising their specific obligations under Article 14 (1) (e), the African Commission reiterates the importance of States Parties' obligations in relation to access to information and education as highlighted in paragraph 26 above.
38. In view of the serious nature of HIV testing and in order to maximise prevention and care, public health legislation should ensure that pre-

and post-test counselling be provided in all cases. With the introduction of home-testing, States Parties should ensure quality control, and establish legal and support services for those who are the victims of misuse of such tests by others.

39. States Parties should ensure that information on one's health status held by authorities is subject to strict rules of data protection and confidentiality, and must be protected from unauthorised collection, use or disclosure.

Sexual and reproductive health procedures, technologies and services

40. States Parties are obliged to guarantee the availability, accessibility and affordability of comprehensive and quality procedures, evidence based technologies and services for the medical monitoring of one's sexual and reproductive health. These procedures, technologies and services should be evidence-based and should be appropriate to the specific needs and context of women. In the context of HIV, this should include: access to HIV testing, CD4 count, viral-load, TB and cervical cancer screening that may affect women's sexual and reproductive health.
41. States parties should provide training for healthcare workers on, amongst others, non-discrimination, confidentiality, respect for dignity, autonomy and informed consent in the context of sexual and reproductive health services for women.
42. States Parties must ensure that testing is not used as a condition for access to other health services, including treatment, contraception, abortion, medical examination, pre- and post-natal services, or any other reproductive health care. Furthermore, positive test results should not be a basis for coercive practices, or, the withholding of services.

43. States Parties should ensure that policies and programmes are sensitive to the needs of all women taking heed of the varying specificities of different groups of women highlighted in paragraph 14 above. These methods should include youth friendly services, and be part of a comprehensive package of care in the context of sexual and reproductive health.
44. The specific approaches mentioned in paragraph 39 above must ensure that these procedures, technologies and services are available in a manner that complies with ethical standards, is confidential, voluntary and obtained with informed consent.
45. States Parties should create safe and enabling conditions through legal, policy, regulatory and programmatic measures that create positive conditions for informed disclosure and lawful notification of one's health status and the health status of one's partner as enumerated in paragraphs 13 and 18 respectively.

Barriers to sexual and reproductive health rights

46. States Parties should take all appropriate measures, through policies, programmes and awareness-raising towards the elimination of all barriers to women and girls enjoyment of sexual and reproductive health. In particular, specific efforts should be made to address gender disparities, harmful traditional and cultural practices, patriarchal attitudes, discriminatory laws and policies in accordance with articles 2 and 5 of the Protocol. In this regard, States should collaborate with traditional and religious leaders, social movements, civil society, non-governmental organisations including women-centred NGOs, international organisations and development partners.

47. States should take all appropriate measures to eliminate economic and geographic barriers of women in accessing health services and thus bring such services closer to communities, particularly for women residing in rural communities.

Provision of financial resources

48. States Parties, in line with Article 26 (2) of the Protocol and paragraph 7 of the Maputo Plan of Action, should fund and empower public health authorities to provide a comprehensive range of services for the prevention and treatment of every person's sexual and reproductive health.

Redress for sexual and reproductive health violations

49. States shall ensure the availability and accessibility of redress and referral mechanisms such as legal and medical services in cases of violations of women sexual and reproductive rights, including non-discrimination, confidentiality, respect of autonomy and informed consent.
50. Failure by a State Party to comply with Article 14(1) (d) and (e) as clarified and enumerated in these General Comments will amount to a violation of the provisions of the said article.
51. The African Commission in deciding a communication and examining State reports relating to obligations under Article 14(1) (d) and (e) of the Protocol will be guided by these General Comments.
52. States are encouraged to submit timely periodic reports on measures taken to implement the African Women's Rights Protocol in line with

Article 26 (1). Reports should include consideration of these General Comments and should respect the guidelines developed by the African Commission for this purpose.

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